PUNCAKDANA SDN BHD

v.

TRIBUNAL TUNTUTAN PEMBELI RUMAH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[NO: R1-25-53-2003]
4 SEPTEMBER 2003

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application to quash awards of Tribunal for Homebuyers Claims - Sale and purchase agreements entered into before amendments establishing Tribunal came into force - Whether Tribunal had jurisdiction to hear and adjudicate upon such cases - Whether substantive rights of applicants affected - Housing Developers (Control and Licensing) (Amendment) Act 2002, ss. 16AD, 16N(2)*

LAND LAW: *Housing developers - Sale and purchase agreement - Sale and purchase agreements entered into before amendments establishing Tribunal for Homebuyers Claims came into force - Whether Tribunal had jurisdiction to hear and adjudicate upon such cases - Whether substantive rights of applicants affected - Housing Developers (Control and Licensing) (Amendment) Act 2002, ss. 16AD, 16N(2)*

STATUTORY INTERPRETATION: *Retrospective operation - Not justifiable in absence of clear intention - Whether Parliament intended Part VI of Housing Developers (Control and Licensing) (Amendment) Act 2002 to operate retrospectively - Housing Developers (Control and Licensing) (Amendment) Act 2002, ss. 16AD, 16N(2)*

In these two applications by the applicants for an order of *certiorari* to quash the awards of the Tribunal for Homebuyers Claims ('the Tribunal'), the contentious issue was whether or not the Tribunal had the jurisdiction to hear and adjudicate upon cases in which the sale and purchase agreements were entered into before 1 December 2002. The Tribunal had been established by the amendments made to the Housing Development (Control and Licensing) Act 1996 *vide* the Housing Developers (Control and Licensing) (Amendment) Act 2002 ('the Amendment Act'), which was brought into force on 1 December 2002. The applicants submitted that Part VI of the Amendment Act would affect their substantive rights if construed retrospectively since s. 16AD of the Amendment Act renders non-compliance with an award of the Tribunal a criminal offence whereas the respondents, however, contended that s. 16N(2) of the Amendment Act confers retrospective jurisdiction to the Tribunal.

Held:

[1] There is no indication in s. 16N(2) or any other provision of Part VI of the Amendment Act that Parliament intended the amendments establishing the Tribunal to affect sale and purchase agreements entered into before 1 December 2002, and such an absence, particularly when Parliament had specifically addressed the question of restropectivity elsewhere in the same amendments, makes it very clear and obvious that Parliament did not intend to have Part VI of the Amendment Act operate retrospectively. Moreover, s. 16N(2) cannot be interpreted to operate retrospectively because of the existence of s. 16AD, which makes non-compliance with an award of the tribunal a criminal offence. Thus, to permit the Tribunal to exercise its jurisdiction over the said sales and purchase agreements would be to allow retrospective criminal laws, and this would affect the substantive rights of both applicants. Hence, the Tribunal had no jurisdiction to hear and adjudicate upon cases in which the sale and purchase agreements were entered into before 1 December 2002. (pp 355 a-c, g-h & 356 e-f)

[Applications allowed.]

Case(s) referred to:

Sim Seoh Beng & Anor v. Koperasi Tuan Muda Sungai Ara Bhd [1995] 1 CLJ 491 CA ***(foll)***

Legislation referred to:

Federal Constitution, art. 7

Housing Development (Control and Licensing) (Amendment) Act 2002, ss. 16AD, 16M, 16N(2), 22C, 32(2)

For the applicant - Sree Harry; M/s Sri Ram & Co

For the 1st respondent - Umi Kalthum Abdul Majid SFC (Rozlinda Yahya)

For the 2nd-9th, 11th-12th, 14th-16th, 19th-21st, 23rd, 26th, 27th & 32nd respondents - KL Wong (KY Soo); M/s KL Wong

For the 10th, 17th, 22nd, 24th, 25th, 31st, 33rd, 36th, 37th, 40th & 49th-51st respondents - Viola De Cruz; M/s VL DeCruz & Co

For the 34th, 35th, 38th, 41st, 44th, 45th, 47th & 48th respondents - Mohd Noh Nasira; M/s Nasira Aziz & Co

Reported by Suresh Nathan

JUDGMENT

Raus Sharif J:

These two applications, RI-25-58-2003 and RI-25-53-2003, with the agreement of all parties were heard together. Both applicants are licensed housing developers. In their applications for an order of *certiorari* to quash the awards of the Tribunal for Homebuyers Claims (the tribunal) the applicants raised a common legal issue, that is whether or not the tribunal has the jurisdiction to hear and adjudicate on cases where the sale and purchase agreement which was entered before 1 December 2002.

The tribunal had been established by the amendments made to the Housing Development (Control and Licensing) Act 1996 ("the Principal Act") *vide* the Housing Developers (Control and Licensing) (Amendment) Act 2002 ("the Amendment Act"). The Amendment Act had been assented to on 23 January, 2002 and subsequently was brought into force on 1 December 2002.

Part VI of the Amendment Act established the Tribunal. Section 16M has set out the jurisdiction of the Tribunal which provide as follows:

> 16M (1) Subject to sections 16N and 16O, the Tribunal shall have the jurisdiction to determine a claim lodged under section 16L, where the total amount in respect of which an award of the Tribunal is sought does not exceed twenty-five thousand ringgit.
>
> (2) Subject to subsection (1), respondent to a claim may raise a debt or liquidated demand as:
>
> (a) a defense; or
>
> (b) a counter claim.
>
> (3) Where a respondent raises a debt or liquidated demand under subsection (2) and the debt or demand is proved the Tribunal shall:
>
> (a) give effect to the defense; or
>
> (b) hear and determine the counter-claim notwithstanding that the original claim is withdrawn, abandoned or struck out.
>
> (4) Any claim lodged with the Tribunal may include loss or damage of a consequential nature.

With the establishment of the tribunal, the homebuyers now have an additional avenue to seek redress against housing developers. Before this, their only redress was to file their claims with the civil courts. Since the establishment of the tribunal, according to a report, as of 3 July, 2003, there are 2,209 cases have had been filed before the tribunal, out of which 438 cases have been disposed off. The Tribunal has already awarded RM2,396,537.73 of compensation to the home buyers. All of these cases, were in respect of cases arising from the sale and purchase agreements signed before 1 December 2002 that is, before the establishment of the Tribunal.

In these two applications, the sale and purchase agreements between the applicants and respondents of home buyers had also been signed before the establishment of the Tribunal. It is the applicants submissions that the Tribunal has no jurisdiction to hear their disputes with the respondents home buyers because Part VI of the Amendment Act, which established the Tribunal, does not operate retrospectively. The respondents, on the other hand, have submitted to claim that the Tribunal has the jurisdiction. According to them, section 16N clearly give the Tribunal the jurisdiction to hear their claims eventhough the sale and purchase agreements were entered before the establishment of the Tribunal.

The thrust of the applicants' submissions is that, Part VI of the Amendment Act, which established the Tribunal with effect as at 1 December, 2002, if construed retrospectively would affect their substantive rights. This is because s. 16AD of the Amendment Act, make non-compliance with an Award of the Tribunal a criminal offence.

The respondents in reply, submitted that, the clear words of Parliament indicating that Part VI of the Amendment Act is to operate retrospectively is found in s. 16N(2) which reads as follows:

> (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later that twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in his sale and purchase agreement.

With respect, I am unable to hold that s. 16N(2) could be read to confer retrospective jurisdiction to the Tribunal. To me, s. 16N does not deal with the question of retrospectivity. Section 16N is simply a section that serves to limit the jurisdiction of the Tribunal where it has jurisdiction by virtue of s. 16M. This is evident from the heading of the section – 'Limitation of jurisdiction'. This is also made clear in the body of s. 16N(2), which provides:

> This jurisdiction of the Tribunal shall be limited to a claim ...

Thus, s. 16N could not therefore, be read to confer retrospective jurisdiction on the Tribunal or to enlarge the jurisdiction of the Tribunal. If it is true that Parliament intended the Tribunal to have retrospective jurisdiction over sale and purchase agreements entered before the appointed date of coming into force of the Amendment Act, it would have said so in clear words in the same manner that Parliament did, in s. 32 of the Amendment Act. Section 32 of the Amendment Act inserted a few sections to the Principle Act. One of the sections inserted is s. 22C which reads as follows:

> 22C. Notwithstanding anything contained in any written law, a homebuyer as defined in section 16A shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the purchaser and that housing developer unless a contrary intention is expressed in any agreement, assignment or charge between the homebuyer and his financier in which case the prior written consent of his financier must first be obtained before he exercises any of his rights under this section.

In relation to this new s. 22C, s. 32(2) of the Amendment Act provides as follows:

> 32(2) Every agreement, assignment or charge lawfully entered into between purchaser and his financier **before the appointed date** shall be subjected to, and the parties shall be entitled to the benefits of the new section 22C of the Principal act as inserted into the Principal Act by subsection (1).

Section 22C above, essentially provides that a homebuyer may initiate an action in his own name, notwithstanding that he has assigned his rights under the sale and purchase agreements, unless a contrary intention is expressed in the assignment. Parliament, in sub-s. 32(2) has provided in clear terms that the new s. 22C is to apply retrospectively to assignments entered before the appointed date of the Amendment Act. Thus, when Parliament had thought, it fit to expressly state about the retrospective application of s. 22C, then equally

Parliament would have said so in clear words in the same manner to s. 16N(2) if the Tribunal was to operate retrospectively. But there is no indication in s. 16N(2) or other provisions of Part VI of the Amendment Act that Parliament intended the amendments establishing the Tribunal to affect sale and purchase agreements entered into before 1 December 2002. In such absence, particularly where Parliament has had specifically addressed the question of retrospectivity elsewhere in the same amendments, makes it very clear and obvious that Parliament does not intend to have Part VI of the Amendment Act to operate retrospectively.

Moreover, s. 16N(2) could not be interpreted to operate retrospectively because of the existence of s. 16AD which make non-compliance with the Award of the Tribunal a criminal offence. Section 16AD provides:

> 16AD (1) Any person who fails to comply with an award made by the Tribunal within the period specified therein commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.
>
> (2) In the case of a continuing offence, the offender, shall, in addition to the penalties under subsection (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after conviction.

Section 16AD above, clearly exposed both applicants not only to civil liability but also to a criminal liability. Thus, without doubt affects their substantive rights if s. 16N is to be construed to operate retrospectively. This is because at the time of the sale and purchase agreement was entered into, any breach of the agreement only had civil consequences. The applicants' total exposure for the alleged breach was only a civil liability in that if a monetary judgment was entered for liquidated ascertained damages for late delivery and if the applicants were unable to be satisfied with the said monetary judgment then the applicants are only open to the risk of the various mode of enforcement. Surely, the applicants do not envisaged at the time of the sale and purchase agreement which they had entered into, could produce a result of a breach of the agreement that could give rise to a criminal offence being committed. In the circumstances, to permit the Tribunal to exercise its jurisdiction over the sale and purchase agreement entered into before 1 December 2002 is to allow retrospective criminal laws. This is prohibited by art. 7 of the Federal Constitution.

No doubt, under s. 16AD, it is only the act of non-compliance with an Award of the Tribunal that attracts a criminal liability and not the alleged breach itself. But, to me, the Award is an extension of the breach. What is relevant is the time of the breach and in these two applications the breaches occurred before the establishment of the Tribunal. Thus, if Parliament had intended that the Amendment Act is to have retrospective application in that Parliament intended housing developers to be criminally liable for its breaches which are not unlawful act at the time it was done, then Parliament would have to expressly and clearly said so. This was not done.

In *Sim Seoh Beng @ Sim Sat Beng & Anor v. Koperasi Tuan Muda Sungai Ara Bhd* [1995] 1 CLJ 491, the Court of Appeal laid down the applicable test as follows:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* the law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity.

Applying the above test, I am of the view that the amendments establishing the Tribunal if applied retrospectively would affect the substantive rights of both applicants. I also find that there is no clear indication in the Amendment Act for a retrospective application of Part VI which established the Tribunal. As such, no rule of statutory interpretation including the purposive approach can be of any assistance to give Part VI of the Amendment Act a retrospective application. Thus, my answer to the legal question posed in these two applications is that, the Tribunal has no jurisdiction to hear and adjudicate cases where the sale and purchase agreement was entered before 1 December 2002.

Accordingly, I allow both applications but with no order as to costs.